Counsel for the defendant company submitted that on a proper construction of clause 26, the charterers were under a liability to continue to pay the hire only if the detention of the vessel was caused by some neglect or default on the part of the charterers. With regard to this submission, it is to be observed that there is no reference whatsoever in clause 26 to any question of neglect or default on the part of the charterers whereas it is clearly stated that if the detention shall arise out of the acts, neglect or default of the owners, their servants or agents, then the owners will indemnify the charterers against costs, charges and other matters set out in the clause. It is also to be observed that when the parties have in mind possible acts of default on the part of the charterers they are careful to mention them in the time charter. An example of this can be seen in clause 28. The omission from clause 26 of any mention of acts of default on the part of the charterers is therefore significant. In my opinion the submission of counsel for the defendant company on this point must fail.

As a defence based on frustration of contract has been raised, it is necessary to examine the express terms of the contract. The opening words of clause 26 are as follows:—

> 26. If for any reason whatsoever the vessel shall be detained at any port by any authority having dominion over that port the Charterers shall continue to pay the charter hire as provided for in this Agreement .....

These words could hardly be more comprehensive. The language is clear and unequivocal and capable of only one meaning. There is nothing ambiguous in the expressions used. The meaning of the words is perfectly clear and I do not think I can improve on them by attempting to paraphrase them. The rest of the words in clause 26 contains nothing which cuts down the extreme width of the opening words. It is plain that the situation which has arisen as a result of the detention of the *Sri Seria* at Tanjong Balai is expressly dealt with by clause 26. In this connection, it is relevant to refer to the case of *Otto Banck* v. *Adam Bromley & Son* [1] in which Bailhache J., dealing with the doctrine of frustration, said (at p. 126):

> "Frustration is an implication of law which is introduced of necessity, when the courts think so, into a contract, and never can be introduced when the contract deals with the precise state of affairs which it is alleged caused the frustration."

In the present case the precise state of affairs is dealt with by clause 26 and there is therefore no room for the application of the doctrine of frustration.

Section 3(3) of the Law Reform (Frustrated Contracts) Ordinance, 1959 (Ordinance No. 6 of 1959) provides as follows:

> 3(3). Where any contract to which this Ordinance applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Ordinance to such extent, if any, as appears to the court to be consistent with the said provision.

In my opinion, clause 26 is a provision which, upon the true construction of the contract, is intended to have effect in the circumstances which have arisen in this case, and full effect should be given to it. There is no reason to give effect in any way to section 2 of the Ordinance.

For the reasons which I have stated, there must be judgment for the plaintiff for the sum of $15,200 with costs. The counterclaim is dismissed with costs.

*Judgment for the plaintiff.*

Solicitors: *Hilborne, Chung & Co.; Allen & Gledhill.*

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## ONG CHAN TOW v. REGINA

[A. Cr. J. (Winslow J.) February 20, 1963]

[Singapore — Magistrate's Appeal No. 148 of 1962]

*Penal Code, s.304A — Rash and negligent act by omnibus driver — Sentence of fine — Appeal — Misdirection on weight to be attached to evidence of expert witness — "Causa causans" of accident — Inadequacy of sentence of fine.*

*Criminal Procedure — Sentence — Appeal — Inadequacy of sentence of fine in cases under Penal Code, s.304A.*

*Criminal evidence — Expert witness — Misdirection on weight to be attached to evidence of.*

The appellant, an omnibus driver, was charged and convicted by the District Court under section 304A of the Penal Code and sentenced to a fine of $1,500 or 9 months' imprisonment in default and he was disqualified from driving for 3 years. The appellant appealed. It was *inter alia* contended for the appellant (i) that the learned District Judge erred in rejecting the evidence of the expert and (ii) that the District Judge misdirected himself in holding that the collision took place in the centre of the road and that the *causa causans* of the accident was the negligent act of the appellant.

**Held:** (1) in the circumstances of the case there was little light the expert could throw on the cause of this accident;

(2) it did not in this case matter whether the collision took place at the centre or on the wrong side of the road. The act of the appellant was the *causa causans* of the collision and he was solely responsible;

(3) the imposition of a fine, in the circumstances, was manifestly inadequate.

MAGISTRATE'S CRIMINAL APPEAL.

*A. J. Braga* for the appellant.

*T. S. Sinnathuray* (Deputy Public Prosecutor) for the respondent.

**Winslow J.:** The appellant was convicted on a charge of causing the death of one. Chuang Shu Yen, on the 16th May, 1962 by negligent driving in Jurong Road, an offence punishable under section 304A of the Penal Code and was sentenced to a fine of $1,500 or 9 months' imprisonment in default; he was also disqualified from driving for 3 years.

According to the prosecution, an omnibus belonging to the Green Bus Co. driven by the appellant collided with a Mini Minor motor car driven by the deceased at the 14¼ m.s. Jurong Road whilst the former was emerging from a minor side-road, known as the Old Jurong Road, without stopping at a "Halt" sign at its junction with the main Jurong Road and turning to its right towards the City.

The principal eye-witness who saw the whole incident and whose evidence was accepted said that he was on the right-hand side of the road facing Tuas with his back to the City when he saw the bus emerging from the side-road without stopping at the "Halt" sign. It was in front of him and towards his left at a distance of 40-60 yards. A red Mini Minor car which was travelling from the direction of the City on its proper side of the road went past him and collided with the on-coming bus as it was negotiating the bend. The momentum of the bus was so great that it pushed the red car backwards and both vehicles went interlocked into a ravine to his right. The point of impact was about 20 feet in front of him. Both vehicles had been travelling at about the same speed before the collision, i.e. at about 30-40 m.p.h.

A Police witness who came to the scene shortly afterwards discovered two tyre marks 48 feet and 31 feet 3 inches long, respectively, and according to him, these were made by the off-side wheels of the bus. The first one stretched from the mouth of the side road towards the site of the collision ending at a point 10 feet 8 inches from the grass verge on the left-hand side of the road facing the City. The road was 23 feet 10 inches wide. The second tyre mark commenced at the grass verge itself and stretched to the rear of the bus in its final position in the ravine.

The principal damage to the bus was to the middle portion of its radiator grill which was dented inwards, to its front bumper which was bent inwards towards the near-side and to its front nearside mudguard. In short the damage extended from mid-front to its front near-side. The damage to the Mini Minor was extensive, its front and its near-side front being severely crushed. Its solitary occupant was killed on the spot, having sustained a fractured skull and a complete fracture of the cervical vertebrae.

On this evidence, the appellant was called upon to make his defence. He stated on oath that he conformed to the "Halt" sign where he stopped for 4 or 5 seconds and that he had a clear view of the main road to his right. Although he saw the red car approaching him from his right about 300-400 feet away he thought it was safe to proceed and he began to negotiate the turn to his right, starting on second gear as he never used the first. Whilst actually turning he used the 3rd gear. He said that the car was approaching him very fast on its wrong side. Just before the impact the bus was still at an angle to the road. Both vehicles were moving at the time of impact. In cross-examination, he said that, although he saw the car approaching, he thought he had sufficient time. He agreed that the bend along which the red car was travelling was a wide one. He could not explain why the car was on its wrong side. When asked where the car was when it started deviating he answered that it was 30-40 feet from the bus.

The appellant called, as his witness, a Motor Engineer and Insurance Assessor to give expert evidence on his behalf based on a view of the scene of the accident 2 months later and a study of the exhibits before the Court, namely the photographs and plan. He had also seen the damaged car but not the bus. He had seen a wheel track on the grass verge and other marks. Assuming these were the marks in question, he was of the opinion that the collision took place on the grass verge itself. He thought that the Mini Minor had been travelling fast and that if it had travelled more slowly there would have been room for it to pass on the off-side of the bus, i.e. on the deceased's correct side of the road. He thought that the accident could not have taken place in the middle of the road; if it had done so both vehicles would have stopped dead in the centre of the road. Furthermore, he said there was no debris on the road nor any side grazing marks such as there would have been if the bus had pushed the car to the grass verge. He was emphatic that the bus did not push the car. He challenged the evidence that there were tyre marks on the road, thus flatly contradicting the Police evidence on this point. He admitted he had not examined the bus and that he would have given a better opinion if he had.

On the evidence before him, the learned District Judge found the charge against the appellant proved, after having considered the evidence carefully and studied the sketch plan, measurements and the photographs tendered. He held that the *causa causans* of the accident was the negligent act of the appellant in making his turn without any regard for the safety of the deceased, notwithstanding any possible contributory negligence on the part of the deceased of which there was no evidence apart from that of the appellant which he rejected. The learned District Judge also rejected the evidence of the expert on the ground that it was extremely biassed against the prosecution and bordered on the ridiculous as he was basing his opinion on 2 visits to the scene long after the accident and after examining the same materials as were already before the Court. The learned District Judge held that the factual evidence was of a simple and straight-forward nature and with this I cannot disagree.

Counsel for the appellant, Mr. Braga, preferred 6 grounds of appeal against the decision of the learned District Judge which criticised the rejection by the learned District Judge of the expert evidence as a whole and that of the appellant as to his stopping at the "Halt" sign.

Complaint was also made that the evidence of the main eye-witness should not have been wholly accepted and that the learned District Judge had misdirected himself in holding that the collision took place at the centre of the road and in concluding that the *causa causans* of the accident was the negligent act of the appellant.

Notwithstanding these criticisms, some of which are not entirely without merit, the facts in issue in this appeal are fairly clear-cut. In the circumstances of this case I do not appreciate how the evidence of the motoring expert could have been of very much assistance to the learned District Judge when the simple issue before him was whether the appellant had failed to stop at the "Halt" sign and subsequently turned right from a minor road into a major road in the face of motorists approaching from his right thus showing a criminal disregard of his duty of care towards such users of the road.

The expert called for the appellant would naturally tend to give evidence in favour of the appellant's version — otherwise he would not have been called as a witness — and to that extent, every such witness can be said to be biassed against the version of the other side. In this case there was some justification for the learned District Judge's strictures that the expert was extremely biassed, for, not only did he flatly refute the existence of simple facts like tyre marks on the road and on the grass-verge which the Police say they saw, but he expressed emphatic opinions on the possible speed of the motor-car, and how it would probably have been travelling round the bend towards the junction, on which matters the learned District Judge had ample materials from which to form his own independent opinion.

Further, questions relating to the existence of debris or broken glass on the road which help to pin-point the site of a collision are clearly matters for the Court and not the expert. Such an expert should not be asked to give his conclusions on matters which are eminently matters for the Court to decide, otherwise he would tend to arrogate to himself the functions of the Court. The motoring expert is there to help the Court on technical and mechanical matters, not to draw inferences which even a layman can equally well draw.

Subject to these observations as to the boundaries within which the expert should confine his evidence there was little light that the expert could throw on the cause of the accident. For reasons which I shall explain, it was immaterial exactly where, in or near that junction, the collision occurred, having regard to the clear evidence as to how the appellant drove his bus immediately before the collision.

If the bus had been turning right and had not quite completed the turn the driver of the oncoming car must, for obvious mathematical and psychological reasons, have been perplexed, if not confounded, by the act of the appellant which compelled him to choose between two alternative evils, not of his own making, to wit, squeezing through the space on the off-side of the bus which must have, at some stage, been almost literally blocking the correct side of the deceased's road, or squeezing through the space on the near-side of the bus, i.e. between the bus and the grass verge. But this space was being so rapidly narrowed down that, in this dilemma, the deceased ran full tilt into the mid-front and near-side of the bus whilst attracted, in the agony of the moment, to what appeared to be the less destructive of the two alternatives.

If this is accepted, as I think it can, the cause of the accident is clear. It was not any intervening negligence on the part of the deceased, as Mr. Braga contended, but it was the original negligent act of the appellant in failing to stop at the junction and in taking the turn to his right in such a manner as to give the deceased no possible "escape route" from the dangers with which he suddenly found himself confronted on a major road where he undoubtedly had the right of way without any restriction on speed.

It therefore matters not whether the collision took place at the centre or on the wrong side of the deceased's road. The act of the appellant was the *causa causans* of the collision and he was solely responsible.

The other criticisms made of the learned District Judge's grounds of decision involve considerations of findings of fact on which I am not prepared to say that he misdirected himself subject to the observations which I have just made as to the probable point of impact which must have been between the centre and the grass verge. These do not necessarily affect the issue involved as to who was solely or mainly responsible for the accident.

I cannot, in particular, see any reason why the learned District Judge should not have acted generally on the evidence of the principal eye-witness despite my own views as to the site of the collision nor is there any merit in the appellant's contention that there was no justification for the learned District Judge's refusal to accept his evidence that he stopped at the junction.

In the circumstances the appeal against conviction is dismissed.

With regard to the sentence of $1,500 or 9 months' imprisonment and the disqualification from driving for 3 years I do not consider it excessive. In fact I consider the imposition of a fine, in the circumstances, not only generally inadequate as a deterrent but that it is manifestly inadequate having regard to the high degree of negligence shown. I therefore substitute a sentence of 6 months' imprisonment for the fine. The disqualification, however, will be altered to one for one year from the time he leaves prison where I hope he will ruminate over the magnitude of his reckless conduct on this lamentable occasion.

*Appeal against conviction dismissed.*
*Sentence of imprisonment substituted for fine.*